

HOUSE BILL NO. 238

INTRODUCED BY P. MORGAN

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAW GOVERNING ABORTION TO PROVIDE THAT AN ABORTION MAY NOT BE PERFORMED UNLESS THE WOMAN UPON WHOM THE ABORTION IS BEING PERFORMED HAS BEEN GIVEN A CHOICE AS TO WHETHER THE WOMAN WANTS THE UNBORN CHILD TO HAVE AN ANESTHETIC OR ANALGESIC; REQUIRING THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES TO PREPARE AND MAKE AVAILABLE WRITTEN MATERIAL CONCERNING UNBORN CHILD PAIN; REQUIRING CERTIFICATION OF THE REVIEW OR OPPORTUNITY TO REVIEW THE MATERIAL; REQUIRING REPORTS BY PHYSICIANS; REQUIRING A SUMMARY REPORT OF PHYSICIAN REPORTS BY THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; PROVIDING CRIMINAL AND CIVIL PENALTIES AND REMEDIES; PROVIDING FOR PRIVACY PROTECTION IN PROCEEDINGS; AMENDING SECTION 50-20-109, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 11] may be cited as the "Unborn Child Pain Prevention Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 11], unless the context requires otherwise, the following definitions apply:

(1) "Medical emergency" has the meaning provided in 50-20-303.

(2) "Physician" has the meaning provided in 50-20-303.

(3) "Probable gestational age" means the time period that in the judgment of the physician will with reasonable probability be the gestational age of the unborn child at the time that an abortion is planned to be performed.

(4) "Unborn child" means a human who is conceived but not yet born.

NEW SECTION. Section 3. Fetal pain information. (1) At least 24 hours prior to an abortion being performed on an unborn child whose probable gestational age is 16 weeks or more, the physician who is to

perform the abortion or the physician's agent shall inform the pregnant woman, by telephone or in person, that the woman has the right to review the printed material described in [section 5] and that the material is available on a state-sponsored website, with the website address provided. The physician or the physician's agent shall orally inform the woman that the materials have been provided by the state and that the materials contain information regarding unborn child pain. If the woman chooses to view a printed copy of the materials, the printed materials must be either given to the woman at least 24 hours before the abortion or mailed to the woman, by certified mail with delivery restricted to the addressee, at least 72 hours before the abortion. The information required by this subsection may be provided in a tape-recorded version if provision is made to document or otherwise register specifically whether the woman does or does not choose to have the printed material given or mailed to the woman.

(2) The woman referred to in subsection (1) shall certify, in writing, prior to the abortion that the information described in subsection (1) has been provided to the woman and that the woman was informed of the opportunity to review the printed material described in [section 5]. Prior to the performance of the abortion, the physician who is to perform the abortion or the physician's agent shall obtain a copy of the written certification and retain the certification on file with the woman's medical records for at least 3 years after the date of receipt.

NEW SECTION. Section 4. Unborn child pain prevention. Except in the case of a medical emergency, before an abortion is performed on an unborn child whose probable gestational age is 16 weeks or more, the physician performing the abortion or the physician's agent shall inform the woman if an anesthetic or analgesic would eliminate or alleviate organic pain to the unborn child caused by the particular method of abortion to be employed. The physician or the physician's agent shall inform the woman of the particular medical risks associated with a particular anesthetic or analgesic. With the consent of the woman, the physician shall administer the anesthetic or analgesic.

NEW SECTION. Section 5. Printed information. (1) (a) Within 90 days after [the effective date of this act], the department shall cause to be published and shall make available on the department's homepage of the state's website printed material with information concerning unborn children of 16 weeks probable gestational age and at succeeding 2-week gestational intervals in a way that ensures that the information is easily comprehensible. The information must include:

(i) the development of the nervous system of the unborn child;

1 (ii) unborn child's responsiveness to adverse stimuli; and

2 (iii) the methods of abortion procedures commonly employed at each stage of pregnancy.

3 (b) The printed material must be objective, nonjudgmental, and designed to convey only accurate
4 scientific information.

5 (2) The material referred to in subsection (1) must be printed in a typeface that is large enough to be
6 clearly legible. The material must be made available by the department at no cost upon request and in an
7 appropriate number to any person or facility.

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9 **NEW SECTION. Section 6. Department website.** (1) The department shall develop and maintain a
10 stable homepage on the state website to provide the information described in [section 5]. The information must
11 be maintained at a minimum resolution of 70 dots an inch. All pictures in the information must be at a minimum
12 of 200 x 300 pixels. All words in the information must be at a minimum of 11-point font. All information and
13 pictures must be accessible with an industry standard browser that does not require additional plug-ins.

14 (2) Neither the department nor the state may collect or maintain information regarding who uses the
15 information. The department shall monitor the website on a daily basis to prevent and correct tampering.

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17 **NEW SECTION. Section 7. Medical emergency procedure.** When a medical emergency compels
18 the performance of an abortion, the physician shall inform the woman, prior to the abortion, if possible, of the
19 medical indications supporting the physician's judgment that an abortion is necessary to avert the woman's death
20 or that a 24-hour delay will create a serious risk of substantial and irreversible impairment of a major bodily
21 function.

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23 **NEW SECTION. Section 8. Reporting requirements.** (1) Within 90 days after [the effective date of
24 this act], the department shall prepare a reporting form for physicians containing a reprint of [sections 1 through
25 11] and blanks for listing:

26 (a) the number of women to whom the physician or the physician's agent provided the information
27 described in [section 3(1)], the number of women who were provided with the information by telephone and in
28 person, and for each person providing the information, the number of times that the information was provided
29 in the person's capacity of a referring physician and the number of times that it was provided in the capacity of
30 a physician who was to perform the abortion or as an agent of that physician;

(b) the number of women who have obtained a copy of the printed information other than on the website, the number of women who did not obtain a copy of the printed information, and of each group, the number of women who, to the best of the physician's knowledge, obtained an abortion; and

(c) the number of abortions performed by the physician for which information was not provided at least 24 hours before the abortion because:

(i) an immediate abortion was necessary to prevent the woman's death; and

(ii) a delay would create a serious risk of substantial and irreversible impairment of a major bodily function.

(2) The department shall ensure that copies of the reporting forms described in subsection (1) are provided:

(a) within 120 days after [the effective date of this act] to all physicians licensed to practice in the state;

(b) to each physician who subsequently becomes licensed to practice in this state at the same time that the license is issued; and

(c) by December 1 of each year, other than 2005, to all physicians licensed to practice in this state.

(3) By February 28 of each year, each physician who provided or whose agent provided information to a woman pursuant to [section 3] during the previous calendar year shall submit to the department a copy of the form described in subsection (1) of this section, with the requested information entered accurately and completely.

(4) Reports that are not submitted within 30 days of the date due under subsection (3) are subject to a late fee of \$500 for each additional 30-day period or portion of a 30-day period during which the reports are not submitted. The department may bring an action, in district court, against a physician who does not report in accordance with this section or whose report is incomplete for more than 1 year after the reporting date. The action must seek an order requiring the physician to submit a complete report within a time determined by the court or be subject to sanctions for civil contempt.

(5) By June 30 of each year after [the effective date of this act], the department shall issue a report providing statistics for the previous calendar year compiled from the reports submitted pursuant to subsection (3) for each of the items listed in subsection (1). Each report must provide statistics for all prior calendar years adjusted to reflect information from late or corrected reports. The department shall ensure that none of the information included in the reports could reasonably lead to the identification of any individual providing information or to whom information is provided pursuant to [section 3].

(6) The department may adopt rules to alter the dates established in subsection (2)(c), (3), or (5) or to consolidate the forms or reports described in this section with other forms or reports in order to achieve administrative convenience or fiscal savings or to reduce reporting burdens as long as the forms are sent to physicians annually and the report described in subsection (5) is issued annually.

NEW SECTION. Section 9. Criminal penalties. (1) An individual who purposely or knowingly performs an abortion in violation of [sections 1 through 11] is guilty of a misdemeanor punishable as provided in 46-18-212.

(2) A physician who purposely or knowingly submits a false report under [section 8(3)] is guilty of a misdemeanor punishable as provided in 46-18-212.

(3) A criminal penalty may not be assessed against a woman for failure to comply with the provisions of [section 3] requiring written certification that the woman has been informed of the opportunity to review the information referred to in [section 3] unless the department has made the printed material available at the time that the physician or the physician's agent is required to inform the woman of the right to review the material.

NEW SECTION. Section 10. Civil remedies. (1) (a) If the provisions of [sections 1 through 11] were not complied with, a woman upon whom an abortion has been performed, the father of the unborn child, or a grandparent of the unborn child may bring an action against the individual who performed the abortion. An action may be brought only if the individual who performed the abortion purposely or knowingly violated [sections 1 through 11]. A woman upon whom an abortion was attempted while the individual attempting to perform the abortion was in purposeful or knowing violation of [sections 1 through 11] may maintain an action against the individual. An action may seek actual and punitive damages.

(b) Civil liability may not be assessed against a woman for failure to comply with the provisions of [section 3] requiring written certification that the woman has been informed of the opportunity to review the information referred to in [section 3] unless the department has made the printed material available at the time that the physician or the physician's agent is required to inform the woman of the right to review the material.

(2) If the department fails to issue the report required by [section 8(5)], any group of 10 or more citizens of the state may seek an injunction against the director of the department requiring that a complete report be issued within a period stated in the court order. Failure to comply with the injunction subjects the director to sanctions for civil contempt.

(3) If a plaintiff prevails in an action described in subsection (1) or (2), the court shall award reasonable attorney fees to the plaintiff. If a defendant prevails in an action and the court finds that the plaintiff's suit was frivolous or was brought in bad faith, the court shall award reasonable attorney fees to the defendant.

NEW SECTION. **Section 11. Privacy protection in court proceedings.** In a proceeding under [sections 1 through 11], the court shall determine if the merits of public disclosure outweigh the privacy interests of a woman upon whom an abortion has been performed or attempted. The woman may waive a privacy interest. The court, on motion or sua sponte, shall make the determination and upon determining that the merits of public disclosure do not outweigh the woman's privacy interest shall issue orders to the parties, witnesses, and counsel and may seal the record. If determined necessary, the court may exclude individuals from the proceedings to the extent necessary to preserve the woman's privacy. An order must be accompanied by specific written findings explaining why the privacy of the woman should be preserved, why the preservation of privacy is necessary, how the order is narrowly tailored to preserve the privacy interest, and why a reasonable alternative does not exist. In the absence of written consent, anyone other than a public official who brings an action under [section 10] may be identified by initials or a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

Section 12. Section 50-20-109, MCA, is amended to read:

"50-20-109. Control of practice of abortion. (1) Except as provided in 50-20-401, an abortion may not be performed within the state of Montana:

(a) except by a licensed physician;

(b) after viability of the fetus, except as provided in subsection (2); and

(c) unless the woman upon whom the abortion is being performed has been given a choice as to whether the woman wants a fetus of 16 or more weeks probable gestational age to have an anesthetic or analgesic as provided in [section 4].

(2) An abortion under subsection (1)(b) may be performed only to preserve the life or health of the mother and only if:

(a) the judgment of the physician who is to perform the abortion is first certified in writing by the physician, setting forth in detail the facts relied upon in making the judgment; and

(b) two other licensed physicians have first examined the patient and concurred in writing with the

1 judgment. The certification and concurrence in this subsection (2)(b) are not required if a licensed physician
2 certifies that the abortion is necessary to preserve the life of the mother.

3 (3) The timing and procedure used in performing an abortion under subsection (1)(b) must be such that
4 the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in
5 45-2-101. The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health
6 of the mother.

7 (4) For purposes of this section, "health" means the prevention of a risk of substantial and irreversible
8 impairment of a major bodily function.

9 (5) The utilization plan of a physician assistant-certified may not provide for performing abortions.

10 (6) Violation of subsections (1) through (3) and (5) is a felony."
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12 **NEW SECTION. Section 13. Codification instruction.** [Sections 1 through 11] are intended to be
13 codified as an integral part of Title 50, chapter 20, and the provisions of Title 50, chapter 20, apply to [sections
14 1 through 11].
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16 **NEW SECTION. Section 14. Severability.** If a part of [this act] is invalid, all valid parts that are
17 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
18 the part remains in effect in all valid applications that are severable from the invalid applications.
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20 **NEW SECTION. Section 15. Effective date.** [This act] is effective July 1, 2005.
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